Supreme Court U.S.
FILED
JAN 28 2003
OFFICE OF THE CLERK

No. 02-935

IN THE

Supreme Court of the United States

A WOMEN'S CHOICE-EAST SIDE WOMEN'S CLINIC, A CLINIC FOR WOMEN, INC., PLANNED PARENTHOOD OF CENTRAL AND SOUTHERN INDIANA, INC., INDIANAPOLIS WOMEN'S FACILITY, FORT WAYNE WOMEN'S HEALTH ORGANIZATION, INC., ULRICH G. KLOPFER, D.O., WOMEN'S PAVILION, INC., and FRIENDSHIP FAMILY PLANNING CLINIC OF INDIANA, on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

CARL J. BRIZZI, in his official capacity as a Prosecuting Attorney for Marion County, and GREGORY WILSON, M.D., in his official capacity as Commissioner of the Indiana Department of Health,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners respectfully submit this reply brief in support of their petition for certiorari.

ARGUMENT

Respondents ["the State"], echoing the erroneous decision of the court below, argue very candidly that the only possible way in which Indiana's in-person information requirement for women seeking abortions could be held unconstitutional would be if evidence established that the requirement, *when implemented in Indiana*, imposes an undue burden. *See, e.g.*, Respondents' Brief in Opposition ["Opp. Cert."] at 1 (statute "must be judged by its actual effects in Indiana, not by a similar law's impact in another state."); *id.* at 7 (statute is permissible "in the absence of any evidence that Indiana's in-person law is actually having an unconstitutional effect"). But neither *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), nor any other decision in this Court's abortion jurisprudence, prohibits district courts from inferring the likely effects of a statutory requirement from evidence of the effects of similar laws in other states.[1] Indeed, neither the court below nor the State muster a single citation to a case so holding. On the contrary, the best

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[1] In *Casey* itself, this Court had before it no evidence of the *actual* impact of a husband notice requirement for abortion in *any* state, let alone Pennsylvania, since *Casey* involved a pre-enforcement challenge. *See* 505 U.S. at 845. Instead, based on expert evidence about women in abusive relationship and studies about family violence, *see* 505 U.S. at 888-93, this Court held that the requirement was "likely" to impose an undue burden. *Id.* at 893. In fact, this Court specifically noted that the "limited research that has been conducted with respect to notifying one's husband about an abortion" was "too small to be representative." 505 U.S. at 892. Thus, if anything, the evidence here is *more* direct than the evidence available to this Court in *Casey* regarding Pennsylvania's statute, because it is evidence of the actual effects of similar statutes. The holding of the court below that such evidence cannot prove undue burden is irreconcilable with *Casey*'s reliance upon less direct proof of undue burden.

possible evidence of a statute's likely effects is evidence of the effects of similar statutes in other states. The holding of the court below would bar pre-enforcement challenges to any abortion restrictions other than those specifically held unconstitutional by this Court; it is out of step with the entire tenor of the undue burden standard established by *Casey*.

I. Lack of Persuasive Effect.

At trial, the parties' experts agreed with the common-sense statement that a comparison of effects of a requirement of in-person delivery of information with the effects of a statute permitting telephone delivery of similar information would be one way of isolating whether the information was persuasive or whether, instead, observed decreases in numbers of abortions were the result of the burdens of the law. Tr. at 41 (Henshaw); Tr. at 180-82 (Uhlenberg) (agreeing on cross examination that lack of change in percentage of women keeping appointments for abortions before and after statutory information was supplied would be evidence of lack of persuasive effect).

A. Effects Without Requiring Additional Visit.

Here, the record establishes that in Indiana itself, the state-mandated information, divorced from the requirement that the information be delivered in person, has had absolutely *no* persuasive effect. Thus, Delbert Culp, the President of Planned Parenthood of Central and Southern Indiana, testified that after the mandatory information began to be provided orally to Planned Parenthood's patients seeking abortions, the percentage of women who kept their appointments for abortions *increased*, despite the fact that Planned Parenthood's fees for abortion services were increased to "accommodate the law." Tr. at 12 (Culp) ("Our no show rate is going down.").[2] *See also* A-115 (district

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[2] Citations to the trial transcript are in the form "Tr. at __ (name of witness)"; citations to the transcript of the preliminary injunction hearing

court finding). Similarly, Susan Derwin, assistant administrator of Petitioner Clinic for Women, testified that the percentage of women keeping appointments remained stable after the information began to be provided orally to abortion patients, also despite an increase in price for abortions. Tr. at 216 (Derwin).[3] Moreover, in North Dakota, where similar information was also provided by telephone, no change was observed in the number of abortions performed by the sole abortion provider in that state. A-195-96. *See also* A-113 (district court quotes counsel for the State as acknowledging that the only persuasive effect of Indiana's information was to persuade women to have more abortions).[4] In addition, some of the changes observed in Mississippi could not be explained by persuasive effect. *See* A-115 (explaining how changes in interstate travel for abortions in Mississippi "tends to show the absence of a persuasive effect").

B. Effects When Additional Visit Is Required.

In contrast, in Mississippi, where information similar to that required in Indiana and North Dakota was provided in

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are in the form "P.I. Tr. at __ (name of witness)"; citations to the Petition are in the form "Pet. __"; citations to the Appendix to the Petition are in the form "A-__."

[3] The State perpetuates the red herring of the court below in asserting that the preliminary injunction entered by the district court permitted the statutory information to be provided "through the mail," Opp. Cert. at 3, *see also* A-13 (opining that "information delivered orally . . . 'takes' better than information delivered exclusively in writing."). But here the district court only enjoined the statute's requirement that the information must be delivered "in the presence" of the woman, leaving in force the statute's requirement that the information must be delivered "orally." A-239.

[4] The State repeatedly makes the bizarre assertion that the decision of the court below is supported by "a silent record on the issue of persuasive impact" of Indiana's law. Opp. Cert. at 5. Far from being "silent" on the issue, the record speaks with a loud and clear voice: Indiana's law has *no* persuasive effect.

person, necessitating that women make an additional visit to the abortion provider, the evidence established that women were *prevented* from obtaining abortions: the abortion rate decreased, the proportion of second-trimester abortions increased, the proportion of women leaving the state for abortions increased, and the proportion of out-of-state women entering the state for abortions decreased. *See, e.g.*, A-109 (summary of findings regarding Mississippi); A-187 (chart summarizing one analysis of effects in Mississippi). In Utah, which also required an in-person visit, similar effects were observed. A-106-07 (summarizing effects observed in Utah).

The district court's conclusion that Indiana's in-person requirement will prevent women from having abortions, and not decrease the number of abortions through (permissible) persuasive effects is an eminently reasonable inference from the facts. It is not, as the State seeks to portray it, an assessment of the "legal significance of historical facts." Opp. Cert. at 14.[5] Under this Court's holding in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the in-person requirement is unconstitutional because it imposes an undue burden on the abortion right: it prevents many abortions through burdens it imposes, and serves no legitimate interest whatsoever.[6]

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[5] The only holding by the court below that amounts to an assessment of the legal significance of historical facts is the holding expressed in the concurrence of Judge Coffey: that preventing 10% to 13% of women from obtaining abortions does not amount to an undue burden. As explained in the Petition, Pet. at 20, this holding is in conflict with *Casey* and, at the very least, decides an important question of federal law that should be decided by this Court.

[6] The State asserts that even if Indiana's in-person requirement has no persuasive effect, it nevertheless serves the purposes of "inform[ing] women about abortion and . . . ensur[ing] sound medical practice." Opp. Cert. at 18. There is no evidence in the record, and the State cites none, showing that these same purposes are not achieved by the statute minus the in-person requirement, or that these purposes are not already

Faced with this evidence that requiring an additional visit prevents women from having abortions, the State now makes two arguments to justify the decision of the court below. First, the State claims that "there must be some reliable means of applying the Mississippi and Utah study results to Indiana." Opp. Cert. at 9. Second, the State asserts that Petitioners had the burden of explaining *how* Indiana's in-person informational requirement imposes a substantial obstacle, but failed to do so. Both claims are refuted by the record.

II. Mississippi and Utah Effects Apply to Indiana.

The State repeatedly asserts that the record contains no evidence justifying the district court's "evaluation of the Indiana law by using Mississippi and Utah as proxies for Indiana." Opp. Cert. at 14. But the record does contain such evidence. Specifically, Petitioners' expert Dr. Henshaw testified as follows:

> **Q** Do you think the results of your Mississippi studies are generalizable to other states? In other words, they could be used to predict what could occur in other states if similar laws were implemented?
>
> **A** I would think that they would apply to any state in the United States. The culture is similar. The amount charged for abortion, the circumstances under which abortions are obtained, the attitudes toward abortion, are fairly uniform throughout the country.
>
> I'm not saying there's no differences. There are differences. *No two states would be*

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accomplished by the malpractice liability physicians face for failure to engage in sound medical practice or failure to obtain informed consent.

> *exactly affected to the same degree, but the direction of the affect [sic] and the general fact there would be an affect [sic] would be similar anywhere in the country.*

Tr. at 35 (Henshaw) (emphasis added). In other words, Dr. Henshaw, the only expert in the sociology of abortion who testified at trial, testified that a decrease in abortions would be observed in any state that implemented a law like Mississippi's -- though the size of the effect might differ. No testimony controverting this opinion was introduced by the State. Moreover, the very fact that similar effects (decreases) were observed in states as geographically distinct as Mississippi and Utah supports, as a common-sense matter, the conclusion that a similar effect (i.e., a decrease in abortions) would be observed in Indiana.[7]

III. Petitioners Have Explained How The In-Person Requirement Will Prevent Abortions.

The State provides no support for its contention that, even if it is shown that Indiana's in-person requirement will prevent many abortions, Petitioners must also explain "how" it will do so. Under *Casey*, it suffices to show *that* a restriction imposes a substantial obstacle; the exact mechanism need not be demonstrated. In any event, the record contains evidence of how abortions will be prevented. For example, women seeking abortions in Indiana often

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[7] At one point, the State goes so far as to say that inferences about the likely effects of Indiana's law cannot be made absent "*conclusive proof* that abortion availability and other relevant conditions are *the same* for women in Indiana as for women in Mississippi and Utah." Opp. Cert. at 15 (emphasis added). This is simply wrong. Conditions need not be the same; they need only be sufficiently similar so that the direction of the effect will be the same in all three states. Dr. Henshaw's testimony that the direction of the effect (preventing abortions) will be the same suffices to support the inference made by the district court, and certainly suffices to survive under the clearly erroneous standard.

express concerns about arranging transportation to the abortion provider, *see* Tr. at 220 (Derwin), Tr. at 223 (Derwin) ("It's sometimes hard to find someone who they can trust, who they can ask to give them a ride."); about arranging their work and day care schedules in order to keep an appointment; and about where to stay overnight if they are traveling a long distance. Tr. at 220-21, 223 (Derwin). Many women have difficulty paying for abortions. Tr. at 221-22, 224 (Derwin). Further, if a woman is past her first trimester of pregnancy, she must obtain the abortion at Wishard Hospital in Indianapolis, the only second-trimester abortion provider in the state. Tr. at 27 (Culp). Some women are forced to do so by the difficulty of making transportation arrangements. Tr. at 224 (Derwin) ("I know there have been women who have cancelled appointments because they did not have transportation and it got to where they were too far along."). Many women express concerns about preserving the confidentiality of the abortion. Tr. at 223 (Derwin). Some live in abusive relationships and are afraid they will "be beaten or worse" if the abusive partner finds out they are pregnant and planning an abortion. Tr. at 224 (Derwin). Abortion providers and their patients are subjected to harassment by anti-choice protesters, and protesters' opportunity to harass patients and breach their confidentiality is enhanced by requiring women to make an additional visit to the provider. P.I. Tr. at 256-57 (Greening).

All these concerns -- expressed by women even in the absence of an additional in-person informational visit -- explain "how" the in-person requirement will prevent women from having abortions. They are similar to the facts described by the joint opinion in *Casey* as "troubling." 505 U.S. at 886. Here, however, the record contains the additional evidence, lacking in *Casey*, of what has actually occurred in two states when an additional visit is required, evidence of lack of persuasive effect, and this evidence of the mechanisms by which the requirement produces its effects.

While the district court in *Casey* simply found that these mechanisms would be "particular burdens" on some women, *see* 505 U.S. at 886, that court lacked the evidence present in this record that these particular burdens actually constitute substantial obstacles to many women. As Ms. Derwin testified, "For the women having trouble making one trip, two trips can be nearly impossible to make and still remain within the 12 week time frame." Tr. at 225 (Derwin). Indiana's in-person requirement will impose substantial obstacles for many women seeking abortions in the state, and is therefore unconstitutional.

The decision of the court below transforms the undue burden standard into one that requires women in Indiana to endure the violation of their basic constitutional rights before, perhaps, a district court is permitted to enforce the Constitution. Though *Casey* diminished the standard of review applicable to abortion regulations, it did not go so far as to permit states to implement requirements, such as Indiana's in-person informed consent requirement, that will prevent women from obtaining abortions without even serving any interest. Certiorari should thus be granted to bring the Seventh Circuit into harmony with this Court's precedent and to ensure that pre-enforcement challenges to those abortion restrictions with a clear record of impermissible effects remain possible.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: January 27, 2003.